

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, respondent's counsel abandoned its defenses with respect to the underlying compensability of the right upper extremity and any issues with regard to temporary total disability. Thus, the only issue for purposes of this appeal is the nature and extent of claimant's impairment to his neck and right upper extremity. In light of these stipulations, the parties also agreed that for purposes of this appeal, Dr. Majzoub's converted and combined rating of claimant's impairment is 12 percent to the whole body and that Dr. Pazell's rating is 34 percent to the whole body.

ISSUES

The ALJ found the claimant suffered two separate but compensable injuries on July 4, 2003. He went on to award claimant a 17 percent functional impairment to the whole body as well as a 10 percent impairment to the right upper extremity.¹

The respondent requests review of the nature and extent of claimant's impairment to his right upper extremity and his neck. Respondent contends the Award should be modified to reflect a 12 percent whole body impairment based upon the testimony of Dr. Majzoub.

Claimant asks the Board to affirm the ALJ's findings and conclusions in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was hired to provide patient care at respondent's care facility. It is undisputed that part of his job was to mop the floors, a job that involved 2 large areas 45 feet long and 30 feet wide as well as a number of hallways. He was also required to care for the patients. On July 4, 2003, claimant was involved in an altercation with a patient. He went to help restrain the patient and was "karate chopped" in the neck. Claimant dropped to the floor where he was hit again. His right arm immediately went numb. He filled out an accident report that day and referenced an injury to his neck and his right arm.

Claimant informed his supervisor and was referred to Dr. Hish Majzoub for treatment. Claimant told Dr. Majzoub about the accident, describing his cervical injury and numbness in the hand along with right arm pain. Claimant was diagnosed with a disk herniation and after a period of conservative treatment to his neck, Dr. Majzoub recommended surgery to the neck. On April 8, 2004, Dr. Majzoub performed a 2 level fusion (C4-C5 and C5-C6). He released claimant from treatment in June 2004. Sometime thereafter claimant began to experience carpal tunnel symptoms in his right hand and later, his left hand. Dr. Majzoub treated claimant's complaints following a preliminary hearing at which time medical treatment, including surgery, was authorized by the ALJ.

¹ The Award contains other findings as well relating to TTD benefits, medical expenses and the entitlement to future medical benefits. Pursuant to the parties' agreement, those findings are all affirmed and are not at issue in this appeal. And while the ALJ issued an Award that contains two separate awards for the neck and the right upper extremity, the parties have since stipulated that both injuries are compensable and they further agreed that regardless of the impairments found by the Board as a result of this appeal, the ratings should be converted and combined to a whole body impairment.

Dr. Majzoub, claimant's treating physician for both his neck and right hand complaints, testified that the cervical complaints and subsequent 2 level fusion were all causally related to claimant's July 4, 2003 accident. However, the carpal tunnel complaints are, in his view, related to claimant's extensive history of employment with respondent mopping floors.² Dr. Majzoub rated claimant at a 9 percent whole body impairment³ for the cervical injury and resulting surgery. He testified that after surgery claimant voiced no arm pain complaints and demonstrated good neck range of motion. He also testified that the carpal tunnel condition was diagnosed in January 2005. During his deposition Dr. Majzoub was asked to rate the impairment to claimant's right hand, to which he assigned a 4 percent to the hand.⁴ The parties have agreed that when combined, Dr. Majzoub's rating is a 12 percent to the whole body.

Claimant was also evaluated by Dr. John Pazell in November 2007. Dr. Pazell saw claimant after both the neck and hand surgeries and according to him, both the cervical injury and the carpal tunnel syndrome is related to claimant's employment.⁵ He went on to rate claimant's spine condition at 25 percent to the whole body and 20 percent to the upper extremity for the carpal tunnel syndrome to the right hand. When combined, this yields a 34 percent whole body impairment. Dr. Pazell gave very little explanation of how he came to these ratings although, he did testify that he used the DRE model rather than the range of motion model and that he did not consider the results of claimant's surgery, only the presurgery condition, medical records and diagnoses.⁶

On cross examination, Dr. Pazell admitted that claimant's cervical rating could have been a DRE III, which means a 15 percent impairment rather than the DRE IV (25 percent) he used. Similarly, he conceded that claimant's carpal tunnel complaints could be considered in the "mild" category which likewise translates to a lower impairment rating.

In his Award, the ALJ explained that he was "unimpressed" with Dr. Majzoub's rating to the upper extremity.⁷ He concluded that Dr. Majzoub had failed to provide any explanation for his method of rating claimant's hand impairment. He therefore adopted Dr. Pazell's analysis regarding the hand and awarded claimant a 10 percent impairment to the right upper extremity. As for the claimant's cervical spine, the ALJ concluded "that both

² Majzoub Depo. at 9-10.

³ All ratings referenced in this Order are purported to be pursuant to the 4th edition of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*. (Guides).

⁴ Majzoub Depo. at 38-39.

⁵ Pazell Depo. at 5.

⁶ *Id.* at 12-13.

⁷ ALJ Award (June 23, 2009) at 3.

physicians [sic] opinions have equal credibility and balances the two.”⁸ He then averaged the two and awarded claimant a 17 percent impairment to the body as a whole as a result of the July 4, 2003 accident along with a separate 10 percent to the hand.

The Board has considered the record as a whole and in light of the parties’ stipulations at oral argument, the ALJ’s Award should be modified. The Board likewise believes that there are strengths and weaknesses inherent in each physicians’ opinions and finds that neither is more persuasive than the other. But the Board finds that claimant’s impairment is 23 percent to the whole body. The Award is, therefore, modified accordingly.

Although the ALJ found the “attorney fee retainer is reasonable”, the record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant’s counsel desire a fee be approved in this matter, he/she must file and submit his/her written contract with claimant to the ALJ for approval. To the extent the Award approved the counsel’s fee agreement, that finding is reversed and set aside. Claimant’s counsel is directed to file her fee agreement with the Director for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated June 23, 2009, is affirmed in part and modified in part as follows:

The claimant is entitled to 9.58 weeks of temporary total disability compensation at the rate of \$358.64 per week or \$3,435.77 followed by 95.45 weeks of permanent partial disability compensation at the rate of \$358.64 per week or \$34,232.19 for a 23% work disability, making a total award of \$37,667.96.

As of November 16, 2009 there would be due and owing to the claimant 9.58 weeks of temporary total disability compensation at the rate of \$358.64 per week in the sum of \$3,435.77 plus 95.45 weeks of permanent partial disability compensation at the rate of \$358.64 per week in the sum of \$34,232.19 for a total due and owing of \$37,667.96, which is ordered paid in one lump sum less amounts previously paid.

⁸ *Id.*

IT IS SO ORDERED.

Dated this _____ day of November 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lori Fleming, Attorney for Claimant
 William L. Phalen, Attorney for Self-Insured Respondent
 Thomas Klein, Administrative Law Judge